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Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. ~~39~~ 72-39.

JOSE VIRELLA RIVERA, PABLO CANTRES and ANTONIO FALU BENITEZ,
PLAINTIFFS-RESPONDENTS

v.

REDERI A/B NORDSTJERNAN and AXEL AXELSON JOHNSON,
DEFENDANTS AND THIRD PARTY PLAINTIFFS-PETITIONERS,

v.

INTERNATIONAL SHIPPING AGENCY, INC. and COMMERCIAL UNION INSURANCE COMPANY OF NEW YORK,
THIRD PARTY DEFENDANTS-RESPONDENTS

JOSE VALDIVIA,
PLAINTIFF-RESPONDENT,

v.

REDERI A/B NORDSTJERNAN and AXEL AXELSON JOHNSON,
DEFENDANTS AND THIRD PARTY PLAINTIFFS-PETITIONERS,

v.

INTERNATIONAL SHIPPING AGENCY, INC. and COMMERCIAL UNION INSURANCE COMPANY OF NEW YORK,
THIRD PARTY DEFENDANTS-RESPONDENTS.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Counter-Statement of the Case

The four respondents, longshoremen working in the hold of the M/V BRASILIA, were poisoned on August 23, 1966, by carbon monoxide. At the request of a ship's officer a gasoline driven fork-lift was placed in a lower hold to assist in the shifting of cargo into a reefer compartment. About one hour after the work with the fork-lift was in progress, these longshoremen and the other members of their gang complained to their hatch foreman of nausea and dizziness. Work was temporarily halted when the foreman went top-side to confer with the mate.

The vessel had ventilating fans or blowers which were controlled in the ship's engine room, a location inaccessible to the longshoremen. After assurance that the ventilating system would be turned on, and after it was in fact turned on, the foreman ordered a resumption of work. Within an hour after the work was resumed, the four plaintiffs-respondents[1] were simultaneously overcome.

From their opening statements to the jury and thereafter, throughout the trial, counsel for both shipowner and stevedore conceded that the vessel was rendered unseaworthy. Both defendants and third party defendants tried to place the blame on each other for the damages caused to plaintiffs-respondents. The shipowner's theory was that the stevedore's choice of equipment was faulty, and that its foreman, desirous of working his men at a pace above the normal so that a larger profit could be realized, failed to take the necessary precautions for the safety of his men and was hence, incompetent. The stevedore, in turn, contended that it was the ship's duty to supply ventilation and when the ship's officer, who controlled the ventilation

[1] A fifth longshoreman, Elias Noa, was also overcome. He testified at the trial as a witness but never brought suit.

from the engine room, assured the foreman that there would be sufficient air, the stevedore had a right to rely on that representation.

All hypothetical questions posed to expert witnesses contained the assumption that the injured longshoremen were working *under orders* and in reliance on the ship's ventilation. Plaintiffs' motion for a directed verdict at the end of their case was denied. When the motion was renewed at the end of the entire case, defendants' counsel opposed, arguing that either the negligence of the foreman was imputable to the longshoremen, or that they had assumed the risk, which counsel equated with comparative negligence. In the Court of Appeals, petitioners argued that the evidence indicated that the plaintiffs-respondents were contributorially negligent because they knowingly exposed themselves to dangerous conditions.

After viewing the evidence most favorably to the petitioners herein, the Court of Appeals found that the district court committed no error in refusing to allow the issue of comparative negligence to go to the jury because "... the plaintiffs *did* complain of the condition, were told the problem would be remedied, and were ordered to continue working... To say the plaintiffs were contributorially negligent in these circumstances would be to state that in continuing work they assumed the risk of obeying orders. We will not allow assumption of risk to masquerade as contributory negligence". 456 F.2d at 974. (Emphasis in original).

Now for the first time the exonerated shipowner[2] raises a constitutional issue in the present petition and seeks certiorari.

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[2] The apparently anomalous situation of a seemingly indemnified shipowner seeking reversal is explained by the Court of Appeals in footnote 2 of its opinion, 456 F.2d at 973. It is noteworthy that the stevedoring contractor has not joined in the petition and has been made a respondent.

Reasons for Denying the Writ

Plaintiffs-respondents submit that the decision of the Court of Appeals for the First Circuit (a) is in harmony with the applicable decisions of this Court, (b) does not conflict with the decisions of other Courts of Appeals in the field of Maritime Law, (c) presents no issue of constitutional law on the right to trial by jury, and (d) does not subject petitioners to punitive liabilities but conforms to the broad equitable powers inherent in the Admiralty courts.

(a) *The Opinion Below Is in Harmony With Applicable Decisions Of This Court*

Whatever vigor the doctrine of assumption of risk retains after the advent of workmens' compensation law, there can be no question that it has no place in the field of Maritime Law, especially when the vessel is, as in this case, concededly, unseaworthy. *Socony-Vacuum Oil Co.* v. *Smith,* 305 U.S. 424, 59 S. Ct. 262, 83 L. Ed. 265 (1939); *Mahnich* v. *Southern S.S. Co.,* 321 U.S. 96, 64 S. Ct. 455, 88 L. Ed. 561, (1944).

Both of those cases involved seamen, one suing under the Jones Act, 46 U.S.C. 688, and the other under the general Maritime Law theory of unseaworthiness. Longshoremen who are entitled to the same non-statutory protection as are seamen ever since this Court's decision in *Seas Shipping Co.* v. *Sieracki,* 328 U.S. 85, 66 S. Ct. 872, 90 L. Ed. 1099 (1946), *rehearing denied,* 328 U.S. 878, 66 S. Ct. 1116, 90 L. Ed. 1646, are also immune from the defense of assumption of risk. *Palermo* v. *Luckenbach SS Co.,* 355 U.S. 20, 78 S. Ct. 1, 2 L. Ed. 2d 3, (1957), *modified,* 355 U.S. 910, 78 S. Ct. 337, 2 L. Ed. 2d 271 (1958).

Mr. Justice Holmes pointed out many years ago that

where assumption of risk was outlawed as a defense by statute, it crept back into the cases under the alias of contributory negligence. In *Schlemmer* v. *Buffalo R. & P.R. Co.*, 205 U.S. 1, 27 S. Ct. 407, 51 L. Ed. 681, (1907) after cataloging the several different meanings of the phrase "assumption of risk" as it appeared in the cases, he concluded by saying:

> "If a man not intent on suicide, but desiring to live, is said to be chargeable with negligence as a matter of law when he miscalculates the height of a car behind by an inch, while his duty requires him, in his crouching position, to direct a heavy drawbar moving about him into a small slot in front, and this in the dusk, at nearly nine of an August evening, it is utterly impossible for us to interpret this ruling as not, however unconsciously, introducing the notion that to some extent the man had taken the risk of the danger by being in the place at all. But whatever may have been the meaning of the local courts, we are of the opinion that the possibility of such a minute miscalculation, under such circumstances, whatever it may be called, was so inevitably and clearly attached to the risk which Schlemmer did not assume, that to enforce the statute requires that the judgment be reversed."
>
> 205 U.S. at p. 14.

In *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U.S. 54, 63 S. Ct. 444, 87 L. Ed. 610, (1943), this Court tried to inter the doctrine of assumption of risk, at least in the railroad industry as it had in the maritime field, abetted as it was in both instances by Congressional legislation. In so doing, it noted the confusion that had often existed, even in the decision of this Court between the terms "assumption of risk" and "contributory negligence". These defenses were

part of the panorama of devices afforded expanding industry to avoid the consequences of the dangerous work at the expense of the life and limbs of the injured workers. Whatever justification existed for such doctrines under the common law, they were never adopted by the admiralty, especially when the shipowner provided an unseaworthy vessel.

But even at common law, this Court early recognized that a worker was neither contributorially negligent, nor did he assume the risk of a defective appliance, when he had been assured by his employer that the defect would be remedied. *Hough* v. *Texas and Pacific Railroad Company,* 100 U.S. 213, 25 L. Ed. 612 (1879). The Court never retreated from this position, following it in *Kane* v. *Northern Cent. Ry. Co.,* 128 U.S. 91, 9 S. Ct. 16, 32 L. Ed. 339 (1888) and *Delaware L. & W. R. Co.* v. *Converse,* 139 U.S. 469, 11 S. Ct. 569, 35 L. Ed. 213 (1891). In all the other cases cited by the petitioner, either there was a danger "so imminent or manifest to prevent a reasonably prudent man from risking it upon a promise or assurance by the proper authority that the cause from which the peril arose might be removed", *District of Columbia* v. *McElligott,* 117 U.S. 621, 6 S. Ct. 884, 29 L. Ed. 946 (1886), or there were sharp evidentiary disputes of fact, making a submission to the jury necessary. *Davidson Steamship Co.* v. *United States,* 205 U.S. 187, 27 S. Ct. 480, 51 L. Ed. 764 (1907), *Richmond & D.R. Co.* v. *Powers,* 149 U.S. 43, 13 S. Ct. 748, 37 L. Ed. 642 (1893); *Dunlap* v. *Notheastern R. Co.,* 130 U.S. 649, 9 S. Ct. 647, 32 L. Ed. 1058 (1889). There was no disputed fact in the instant case and reasonable men could not possibly infer negligence in reliance upon assurances that ventilation would be provided or in obedience to orders of superiors where there was no apparent danger.

Seaboard A.L.R. Co. v. *Horton,* 239 U.S. 595, 36 S. Ct. 180, 60 L. Ed. 458 (1961) is an excellent illustration of the confusion between assumption of risk and contributory negligence. When denied an instruction on the issue of assumption of risk, the railroad requested an instruction on contributory negligence. It had offered some evidence that the victim should have used a different method of releasing steam from the boiler. A charge on contributory negligence was given but the request that plaintiff be found guilty of contributory negligence as a matter of law was denied. This Court commented upon the alleged failure to properly charge as follows:

> "It is insisted that the trial court erred in refusing to instruct the jury that plaintiff was guilty of contributory negligence as a matter of law. This, also, is based upon the ground of the obvious and imminent nature of the danger to plaintiff arising out of the absences of the guard glass. But the reasonable reliance of the employee upon the employer's promise to repair the defect is as good an answer to the charge of contributory negligence as to the contention that the risk was assumed". 239 U.S. at 600.

Just as in *Horton, Hough* and all the other ancient cases, the petitioners have been trying to equate the term contributory negligence with assumption of risk. Therefore, the decision in the district court and the Court of Appeals are both in perfect harmony with this Court's pronouncements and are in keeping with the humanitarian doctrine of unseaworthiness. It would be sad indeed, if the owner of an unseaworthy vessel could avoid, even partially, his duties of defending on the ground that the injured longshoreman should not have obeyed the orders of his superior or relied upon the assurance of a ship's officer that the unseaworthy condition would be corrected.

(b) *There is No Conflict Among the Circuits*

Most recently, the Court of Appeals for the Fifth Circuit had occasion to pass upon two similar[3] cases of carbon monoxide poisoning to longshoremen. The defense of comparative negligence was not mentioned in either opinion, but "operational negligence of a fellow servant" was raised. *Usner* v. *Luckenbach Overseas Corp.*, 400 U.S. 494, 91 S. Ct. 514, 27 L. Ed. 2d 562 (1971). One case, *James* v. *Sea Land Service, Inc.*, 5 Cir. 1972, 456 F.2d 221, was tried to the court alone; the other, *Carey* v. *Lykes Bros. Steamship Company, Inc.*, 5 Cir. 1972, 455 F.2d 1192, was tried to a jury. Summary affirmances, without oral argument,[4] of the plaintiffs' verdicts were entered.

Obedience, even to an "unreasonable" order, is not negligence. *Darlington* v. *National Bulk Carriers,* C.C.A. 2d 1946, 157 F. 2d 817. The Court of Appeals for the Second Circuit held in *Albanese* v. *N.V. Nederl. Amerik Stoomv. Maats.*, 2 Cir. 1965, 346 F. 2d 481,[5] another case strikingly similar to the case at bar, that there was no evidence that the plaintiff was aware of the danger, or indeed had any choice of action if he were. In that case, just as in this one, the trial court refused to allow the issue of contributory negligence to go to the jury.

The petitioner relies upon the Second Circuit case of *Misurella* v. *Isthmian Lines, Inc.*, 2 Cir. 1964, 328 F. 2d 40. If *Misurella* and the *Albanese* cases presented identical fact situations, one would, perforce, have to be in error.

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[3] A major difference appears to be that in Alabama someone tests for carbon monoxide concentration; in Puerto Rico no one even bothers to do that.

[4] Rule 18, 5 Cir., Rules United States Court of Appeals, 28 U.S.C.A.

[5] Reversed on other grounds, 382 U.S. 283, 86 S. Ct. 429, 15 L. Ed. 2d 327 (1965), rehearing denied 382 U.S. 1000, 86 S. Ct. 534, 15 L. Ed. 2d 490 (1966).

But *Misurella* was aware of the danger; had been ill for a period of more than an hour; and, he continued working while his fellow workers stopped. Thus, some evidence of comparative negligence was present. On the other hand, *Albanese* had no advance warning and was working in obedience to orders. So, too, the plaintiffs-respondents herein stopped work and only resumed work after being assured that the ventilation was functioning. They had no advance warning after resuming work until they all suddenly collapsed. The factual distinction allows for the jury issue in one case and the absence of it in the other.

The Court of Appeals for the Third Circuit reversed a case where the issue of comparative negligence was improperly submitted to a jury. In *Paluch* v. *Erie Lackawana Railroad Company*, 3 Cir. 1968, 387 F. 2d 996, it said at page 999:

> "He (plaintiff) was justified in relying on the experience of his superior, Mr. Brickman, who was in complete control of the work crew. Mr. Brickman indicated to appellant that he had tested the pole and found it to be safe. As it turned out, the stub pole, as well as the main pole, was rotted below the surface level. If Mr. Brickman, a man of experience, did not discover the defect, there is no ground to assert that the appellant was contributorially negligent on the basis that he did not find the pole defective, a contention advanced by the Railroad. Certainly, it is not contributory negligence to fail to discover a danger when there is no reason to apprehend one. From the evidence presented at the trial of this case, a jury could not properly find a lack of due care by the appellant. It was, therefore, fundamental and prejudicial error for the District Court to charge the jury on the issue of contributory negligence and its

diminishing effect upon any verdict it might find in favor of appellant." (footnotes omitted, parenthetical material added).

That Court has affirmed those principles consistently. *Smith* v. *Lauritzen,* 3 Cir. 1966, 356 F. 2d 171, *Eichmann* v. *Dennis,* 3 Cir. 1965, 347 F. 2d 978, *Moore* v. *Smith,* 3 Cir. 1965, 343 F. 2d 206; *Morran* v. *Pennsylvania Railroad Company,* 3 Cir. 1963, 321 F. 2d 402; *O'Neill* v. *Reading Company,* 3 Cir. 1962, 306 F. 2d 204; *Klimaszewski* v. *Pacific-Atlantic Steamship Co.,* 3 Cir. 1957, 246 F. 2d 875.

The case of *Mroz* v. *Dravo Corporation,* 3 Cir. 1970, 429 F. 2d 1156, relied upon by petitioner, was distinguished on its facts by the Court below.

In the Fourth Circuit, the rule of law is the same as expressed in the lower court's opinion herein. *Smith* v. *United States,* 4 Cir. 1964, 336 F. 2d 165; *Ballwanz* v. *Isthmian Lines, Inc.,* 4 Cir. 1963, 319 F. 2d 457.

The decision in *Dubose* v. *Matson Navigation Company,* 9 Cir. 1968, 403 F. 2d 875 is distinguishable by the single phrase "under conditions known to be dangerous." *Dubose* knew of the condition for more than two months and his superiors were unaware of it. However, the same court has held that where the plaintiff-longshoreman was only obeying orders and unaware of the dangers, "the damages recoverable by the plaintiff are not subject to any reduction because of any negligence on his part." *Adams* v. *United States,* 9 Cir. 1968, 393 F. 2d 903, 906.

(c) *There is No Issue of Constitutional Law*

Paraphrasing this Court's language in *Galloway* v. *United States,* 319 U.S. 372, 389, 63 S. Ct. 1077, 1086, 87 L. Ed. 1458, (1943), *rehearing denied,* 320 U.S. 214, 63 S. Ct. 1443, 87 L. Ed. 1851 (1943), if the petitioners' contention

is that a federal judge has no power to direct a verdict for insufficiency of evidence because of the Seventh Amendment to the Constitution, the short answer is that the contention has been foreclosed by repeated decisions made in this Court for more than a century and a half. The practice is explicitly approved by this Court in its adoption of Rule 50, Federal Rules of Civil Procedure, 28 U.S.C.A.

In dissent in *Galloway,* Mr. Justice Black said at page 407 of the official citation:

> "As for myself, I believe that a verdict should be directed, if at all, only when, without weighing the credibility of witnesses, there is in the evidence no room whatever for honest difference of opinion over the factual issue in controversy."

That more stringent test was applied by the trial judge. (A. 5-6 of Petitioners' Appendix).

A half-century earlier this Court said in *Sparf* v. *United States,* 156 U.S. 51, 99-100, 15 S. Ct. 273, 292, 39 L. Ed. 343, (1895):

> "The law makes it the duty of the jury to return a verdict according to the evidence in the particular case before them. But, if there are no facts in evidence bearing upon the issue to be determined, it is the duty of the court, especially when so requested, to instruct them as to the law arising out of that state of the case. So, if there be some evidence bearing upon a particular issue in a cause, but it is so meager as not, in law, to justify a verdict in favor of the party producing it, the court is in the line of duty when it so declares to the jury."

This issue of a violation of a Constitutional right was not raised in either court below and is not even properly before this Court.

(d) *Pre-Judgment Interest and Counsel Fees May Be Awarded Under Admiralty Law.*

Counsel fees, although authorized by statute in cases of obstinacy under Puerto Rican law[6], are recognized in admiralty law as equitable relief to be given when the situation so demands. *Vaughan* v. *Atkinson*, 369 U.S. 527, 82 S. Ct. 997, 8 L. Ed. 2d 88, 1962, *rehearing denied*, 370 U.S. 965, 82 S. Ct. 1578, 8 L. Ed. 2d 834 (1962).

The award of pre-judgment interest was justified by the Court of Appeals, not on the basis of local law, but upon admiralty principles. The Circuits are in agreement on this point and the uniformity of the admiralty law is served by the recognition of this right. *Petition of City of New York*, 2 Cir. 1964, 332 F. 2d 1006; *cert. denied, sub nom. City of New York* v. *Bernstein*, 379 U.S. 922, 85 S. Ct. 277, 13 L. Ed. 2d 335 (1964); *Gardner* v. *National Bulk Carriers, Inc.*, 4 Cir. 1964, 333 F. 2d 676; *National Air Lines, Inc.* v. *Stiles*, 5 Cir., 1959, 268 F. 2d 400, *cert. denied*, 361 U.S. 885, 80 S. Ct. 157, 4 L. Ed. 2d 121, (1959), *rehearing denied*, 361 U.S. 926, 80 S. Ct. 291, 4 L. Ed. 2d 241 (1959).

Conclusion

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari herein be denied.
August 2, 1972.

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[6] 32 L.P.R.A. Appendix §44.4(d).